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82-115

No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1981

RAMON CERVANTES,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

On Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHAT LIMITATIONS ON THE RIGHT OF CROSS EXAMINATION, IF ANY, ARE PERMITTED UNDER THE COURT'S OPINION IN *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)?

II. DOES THE FAILURE OF THE COURT BELOW TO CONSIDER PETITIONER'S ARGUMENT ON APPEAL DEPRIVE HIM OF DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL?

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IN THE
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RAMON CERVANTES,

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VS.

THE STATE OF TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Ramon Cervantes prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered on April 14, 1982. Appellant Cervantes' Motion for Rehearing *en banc* was denied May 26, 1982.

OPINION BELOW

The Texas Court of Criminal Appeals is the highest court in Texas for criminal cases. It affirmed Petitioner's conviction for the offense of solicitation to commit capital murder in an unpublished, *per curiam*, opinion handed down on April 14, 1982 (See Appendix A). Petitioner's Motion for Rehearing *en banc* was denied without opinion on May 26, 1982 (see Appendix B).

JURISDICTION

In its May 26, 1982 Order denying Petitioner's Motion for Rehearing, the Texas Court of Criminal

Appeals agreed to stay the issuance of its mandate for 30 days to give Petitioner time to file the Petition for Writ of certiorari. Further stays will be sought from the court below, or from this Court if necessary, after this Petition is filed. Under Rule 20.4, Supreme Court Rules, Petitioner has 60 days (until July 26, 1982) in which to file this Petition. Jurisdiction of this Court to review a decision of the highest court of a state lies under Title 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution: No person shall . . . be deprived of life, liberty or property without due process of law . . . .
2. The Sixth Amendment, United States Constitution: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.
3. The Fourteenth Amendment, United States Constitution:
   . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the offense of solicitation to commit capital murder alleged to have occurred on or about October 23, 1976 in Dallas, Texas. *See* Sec. 15.03, V.T.C.A., Penal Code. A jury in the Criminal District Court No. 4 of Dallas County, Texas convicted Petitioner on November 9, 1977 and assessed his sentence at 15 years confinement in the Texas Department of Corrections.

This was essentially an aborted murder-for-hire case. The State's principal witness, Michael Moore, testified that he received a telephone call at his apartment on October 5, 1976 from someone later identified as Petitioner. Petitioner discussed the possibility of Moore's killing Petitioner's next door neighbor for $3,000. Moore went directly to the police and later testified that all subsequent conversations with Petitioner were tape-recorded.

There followed approximately seven telephone conversations between Petitioner and Moore over the next 18 days, almost all of which were initiated by Moore. Petitioner added that he first called Moore in September, 1976, and that he had received several calls from Moore before October 5, 1976. In the taped conversations, Petitioner gave a number of excuses or reasons which he testified he thought would discourage Moore's enthusiasm for the deal. These included that Petitioner did not have enough money, that he was considering another job for the "hitman,", that he had friends and relatives in law enforcement, that his phone was tapped, etc. Some of Moore's calls to Petitioner were threatening, including one at 2:30 a.m. on the day of the overt act which suggested that Moore was watching Petitioner's house. These culminated in a meeting later that day in which the Petitioner paid Moore $200 for the "hit." The jury rejected Petitioner's defenses of duress and entrapment.

After the jury was impanelled and sworn but prior to the commencement of testimony, Petitioner made a bill of exceptions on the criminal record of the State's principal witness Michael Moore. The evidence showed that Moore had been placed on three years' probation for burglary on October 3, 1975 and received an early discharge from probation on February 24, 1977. Moore's probation records indicated at least four other arrests. They were marked as Defendant's Exhiibit 1.

Petitioner also tendered certified copies of court records of two other offenses charged to Moore. Defendant's Exhibit 2 showed that Moore had been charged on

October 29, 1974 with the offense of unlawfully carrying a weapon, but that this charge was dropped at the request of Officer D. L. Burgess of the Dallas Police Department during the January term of 1975. Defendant's Exhibit 3 revealed that Moore had been charged on September 13, 1976 in County Court with the offense of assault with bodily injury, but that said charge was dismissed at the request of the District Attorney's office on October 6, 1976, one day after Petitioner's initial contact with Moore. The State tendered the affidavit of non-prosecution in the assault case signed by the complaining witness on September 17, 1976.

Petitioner offered the foregoing evidence on the issues of Moore's bias, motive, violent disposition, and history of cooperation with the police, but the proffer was denied. Later, on direct examination of Moore, the State elicited the evidence concerning his burglary probation which was discharged shortly after Petitioner's arrest. But Petitioner was never able to demonstrate to the jury Moore's prior arrests or their dismissal by prosecution authorities.

On appeal of the resulting conviction to the Texas Court of Criminal Appeals, Petitioner challenged the trial court's exclusion of (1) Moore's arrest on the weapons charge and the dismissal thereof; (2) Moore's arrest on the assault charge and the dismissal thereof; and (3) the prior arrests shown by Moore's probation records. This challenge was based, in part on *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 347 (1974) and the federal constitutional provisions invoked here.

The Texas Court of Criminal Appeals acknowledged that evidence of charges pending against a state's witness is admissible to show possible interest and motive of the witness for testifying. *Randle v. State*, 565 S.W.2d 927 (Tex. Cr. App. 1978). The Court further acknowledged that even charges that had been dismissed but could still be refiled within the limitations period could be admissible against a state's witness for these purposes. *Simmons v. State*, 548 S.W.2d 386 (Tex. Cr. App. 1977). But the Court held that this Petitioner's

failure on his bill of exceptions to demonstrate a quid pro quo for the dismissal of Moore's criminal charges—his failure to show a bias or motive for Moore's testimony related to the dismissed charges — rendered them inadmissible before the jury. *Carillo v. State*,591 S.W.2d 876 (Tex. Cr. App. 1979), distinguishing *Simmons v. State, supra* where the defendant had not even been given the opportunity to make a bill of exceptions.

REASONS FOR GRANTING THE WRIT

I. THE LIMITATIONS IMPOSED BY THE TRIAL COURT ON THE CROSS-EXAMINATION OF THE STATE'S PRINCIPAL WITNESS VIOLATED THE CONSTITUTIONAL STRICTURES OF *DAVIS V. ALASKA*.

Review of the opinion of the Texas court in this case is appropriate for reasons embodied in Rules 17.1(b) and (c), Supreme Court Rules. The conclusions of the Texas court on both the harmless error issue and the judge/jury question are in conflict with this Court's language in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) and many other jurisdictions following *Davis*. Also, the Texas Court purports to resolve the harmless error question when various federal Courts of Appeals are still struggling with this Court's language on the subject.

Preliminary Considerations

The seminal case of *Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed 2d 347 (1974)* establishes the proposition that a prosecution witness' status as a probationer, indictee, or arrestee is admissible to show his possible motive for testifying and the refusal to allow a defendant to probe this area results in an unconstitutional denial of the right to cross examination and due process of law. Various factual similarities bring the instant case squarely within the holding of *Davis v. Alaska*.

First, it should be established that the existence of criminal charges which were dismissed but on which the witness Moore could still have been prosecuted, was a proper *subject* of cross-examination. Such charges went to the witness' history of violence and cooperation with the police as well as his possible bias or motive for participating in the investigation and testifying against Petitioner. This proposition was established as a matter of Texas law in *Simmons v. State, supra.*

In addition, numerous federal cases have permitted cross-examination of government witnesses on dismissed criminal charges which could still be refiled and prosecuted. *United States v. Croucher*, 532 F.2d 1042; 1044-46 (5th Cir. 1976); *but cf. United States v. Hawkins*, 661 F.2d 436, 444 (5th Cir. 1981)(charges brought and dismissed in a foreign country); as well as criminal activities for which the witnesses had not yet been arrestd and charged. *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980)(witness' assault on a police officer during the trial in which the witness was testifying); *United States v. Hall*, 653 F.2d 1002, 1008 (5th Cir. 1981); *United States v. Williams*, 668 F.2d 1064, 1070 (9th Cir. 1981).

Harmless Error

Part of the justification for the Texas court's rejection of Petitioner's contention can be found in the following language from p. 8 of its opinion:

> "The cross-examination of Moore before the jury revealed that Moore had been in fights, had put people in the hospital and had carried a gun on occasion. Moore admitted that he was on felony probation....."

Without expressly saying so, the Texas court thus applied a harmless error rationale, reasoning that the restriction of Petitioner's cross-examination of Moore had produced no demonstrable prejudice since other sinsister facts about Mooore were brought to the jury's attention.

But the Supreme Court stated that a denial of the right of effective cross-examination

> " 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S.Ct. 1245, 16 L.Ed.2d 314. *Smith v. Illinois*, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968)."

Davis v. Alaska, *supra* at 318. Thus did the Court dispose of Alaska's harmless error argument. The above-quoted sentence from the *Davis v. Alaska* opinion has given rise to considerable confusion among the circuits as to the applicability of the harmless error doctrine.

In *United Staes v. Uramoto*, 638 F.2d 84 (9th Cir. 1980), the conviction was reversed because the defendant had not been permitted to cross-examine the government's principal witness—a paid informant—concerning threats the witness might have made to the defendant and others. As in the case at bar, Uramoto's defense was that he acted under duress out of fear of the informant-witness. The court first noted:

> We have repeatedly insisted that wide latitude be given to defendants in their cross-examination of key prosecution witnesses (citations omitted), especially when the witness is a professional informant (citations omitted).

Id. at 86. Relying on the sentence from *Davis v. Alaska* quoted above, the Ninth Circuit then concluded that the harmless error doctrine was inapplicable and that the error could not be cured by the absence of any specific showing of prejudice.

Other circuits, including other panels of the Ninth Circuit, have followed the "no harmless error" rule concerning restrictions on the right of cross-examination. *United States v. Alvarez-Lopez*, 559 F.2d 1155, 1160 (9th Cir. 1977); *and see United States v. Morris*, 485 F.2d 1385, 1387 (5th Cir. 1978); *Skinner v. Cardwell*, 564 F.2d 1381, 1388 (9th Cir. 1977)(dictum) *cert. denied*, 435 U.S. 1009, 98 S.Ct. 1883, 56 L.Ed.2d 392 (1978); *United States v.*

Jorgenson, 451 F.2d 516 (10th Cir. 1971) cert. denied, 443 U.S. 319, 99 S.Ct. 2789, 61 L.Ed. 2d 574 (1972). Several other circuits, as well as other panels of the Ninth Circuit, have recognized the possibility of harmless error notwithstanding the language of *Davis v. Alaksa*. *United States v. Gambler*, 662 F.2d 834, 840-41 (D.C. Cir. 1981); *United States v. Brown*, 546 F.2d 166, 172 (5th Cir. 1977); *United States v. Duhart*, 511 F.2d 7, 10 (6th Cir. 1975), *cert. dism'd.* 421 U.S. 1006, 95 S.Ct. 2409, 44 L.Ed.2d 675 (1975); *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978), *cert. denied*, 444 U.S. 1081, 100 S.Ct. 1035, 62 L.Ed.2d 765 (1980); *Chipman v. Mercer*, 628 F.2d 528, 533 (9th Cir. 1980). The "disharmony" in the Ninth Circuit was most recently acknowledged in *United States v. Williams*, 668 F.2d 1064, 1070, n. 14 (9th Cir. 1981) and the overall confusion was best discussed in *United Staes v. Gambler, supra.*

Judge or Jury Question

Besides invoking the harmless error doctrine, the Texas Court of Criminal Appeals permitted the restricted cross-examination in the case at bar because Petitioner's attempts by bill of exceptions to show motive and bias on the part of Moore—or a quid pro quo for his testiomny—had not been fruitful. In both the instant case and in *Carillo v. State, supra*, the Texas court disapproved of allowing the jury to speculate on motive, animus, or bias where it had not clearly been shown by bill of exceptions. Thus, in cases such as this, the court held that the jury's usual function as the sole judge of the credibility of the witness can be pretermitted by the trial judge in his discretion.

This reasoning, however, also conflicts with the principle enunciated in *Davis v. Alaska*, 415 U.S. 308, 317, 94, S.Ct. 1105, 39 L.Ed.2d 347, 354 (1974) where it was said:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning

had counsel been permitted to fully present it.

The question of a motive for Moore's testimony was a fact question for the jury, not a legal question to be resolved in the judge's discretion.

> The motives which operate on the mind of a witness while he testifies should never be regarded as immaterial or irrelevant . . . Great latitude should be allowed the accused in showing any fact which would tend to establish ill feeling, bias, motive or animus upon the part of any witness testifying against him. The jury should be given the opportunity to judge for themselves the witness's credibility in light of the witness's feelings toward the accused and his motive for testifying [citations omitted].

Davis v. Alaska, *supra* at 317-318. The only limitation on cross-examination in this area of which the Supreme court approved was that

> " . . . broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, ..."

id. at 316, 1110. It is submitted that the weakness of the impeaching material or the witness' evasive answers are not the type of "repetitive" and "harrassing" areas the Supreme Court contemplated.

The convictions were set aside in *Chavis v. North Carolina*, 637 F.2d 213 (4th Cir. 1980), in part because the defendants had not been permitted to show where star prosecution witnesses were being confined or the conditions of their confinement. Regarding the "speculation" condemned by the Texas court in the case at bar, the Fourth Circuit wrote that the defendants there should have been allowed to bring the facts to the jury's attention, even though the facts might not necessarily have discredited the witness in the jury's eyes. *Id.* at 226.

Similarly, after allowing the defendant to explore the possibility of a witness's bias for fear that he might be charged with possession of a stolen car, the trial judge in *United States v. Crumley*, 565 F.2d 945 (5th Cir. 1978), instructed the jury to disregard it as being too speculative. Relying on *Davis v. Alaska*, the appellate court ruled that even though Crumley had not explicitly shown a quid pro quo for the witness's testimony, he should have been "permitted to search for such an agreement." *Id.* at 949. From these cases, and many more like them, the jury's role as judge of the credibility of the witnesses is emphasized over trial judge's efforts to limit "irrelevant" or "immaterial" cross-examination. Clearly the Texas court was out of bounds in both *Carillo v. State*, *supra*, and the instant case in taking from the jury the responsibility of appraising the witnesses' biases and motives.

Conclusion

The Supreme Court has never moved to limit its broad holding in *Davis v. Alaska*. There is an obvious inconsistency between the Texas court's handling of the cross-examination issue in the case at bar and the constitutional language in *Davis v. Alaska*. Furthermore, there is explicit confusion among the Courts of Appeals on the applicability of harmless error analysis in this area. The Texas Court of Criminal Appeals found harmless error in seeming contradiction of the language of *Davis v. Alaska*. For these reasons, this Court should grant the writ of certiorari to resolve the areas of confusion which have developed under *Davis v. Alaska* in the past eight years.

II. THE FAILURE OF THE COURT BELOW TO CONSIDER PETITIONER'S ARGUMENT ON APPEAL DEPRIVED HIM OF DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner's conviction, the State of Texas accorded all persons criminally convicted of a felony the right to appeal their conviction to the Texas Court of Criminal Appeals. Art. V, Sec. 5, Tex. Const. (Vernon's, 1955); Art. 4.03, V.A.C.C.P. (1979). The requirement of Art. 44.24(c) V.A.C.C.P. (1979) that the Court of Criminal Appeals deliver a written opinion in intelligible language setting forth the reasons for its decision has always meant that the Court should consider each issue raised in an appeal. Each issue need not be written upon, *Hawkins v. State*, 613 S.W.2d 720, 723, n. 8 (1981); *Ahearn v. State*, 588 S.W.2d 327, 340, n. 3 (1979), but each issue must be considered.

In Ground of Error No. 6 of the direct appeal from his conviction, Petitioner raised a state constitutional issue pertaining to the right of counsel to conduct voir dire examination of the prospective jurors (see excerpt from Appellant's Original Brief, attached as Appendix C). Specifically, Petitioner complained that he had not been permitted to question individual venireman on the panel but rather had been required to propound his interrogatories to the group as a whole. The State in its reply squarely joined issue with the argument that the defendant's access to individual venireman was not unduly restricted (see excerpt of State's Original Brief, attached as Appendix D). Supplemental briefs of both parties devoted an additional fourteen pages of argument to the question raised and these may be brought forward with the record if certiorari is granted.

The Texas Court of Criminal Appeals apparently misunderstood the ground raised on appeal, for their opinion spoke mainly to the propriety of certain questions for voir dire examination (Appendix A, pp. 11-13). One paragraph noted that Petitioner did not have the right to individual voir dire of the venireman separate and apart from the rest of the panel except in capital murder cases, which, of course, was not Petitioner's original complaint (id). The Court below never addressed Petitioner's precise point or his "white horse case", *Plair v. State*, 276 S.W. 267 (Tex. Cr. App. 1926).

Such misunderstandings by appellate courts are not at all unusual and are almost always corrected on motions for rehearing. Petitioner's Motion for Rehearing brought to the appellate court's attention the failure of its original opinion (see excerpt attached as Appendix E). Yet the motion was denied May 26, 1982, without opinion (Appendix B). There were no procedural defects which would have denied Petitioner a fair hearing on the merits of the ground he originally raised. A complete omission by the appellate court to say anything about a particular issue on appeal would present this Court with a clearer question on certiorari; however, the misunderstanding and tangential writing of the lower court in this case constituted no more of an appellate hearing than the complete omission would have.

When a state establishes an appellate process, it is a denial of equal protection and due process for the state to deny an adequate appellate review on the basis of invidious discrimination. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Anders v. California*, 383 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). Those cases all state that a state which establishes appellate procedures must administer those procedures fairly. It is no less of a denial of due process of law or effective assistance of counsel for such a state to fail to follow the appellate procedure which it has established where such a failure effectively denies the defendant his hearing in the only appeal to which he is entitled. Several Courts of Appeals have lodged objections to procedural rules which deprive a convicted defendant of his right to a fair hearing in the appellate court. *Ruetz v. Lash, 500 F.2d 1225 (7th Cir. 1974); Macon v. Lash*, 458 F.2d 942 (7th Cir. 1972); *Castle v. United States*, 399 F.2d 5642, 650 (5th Cir. 68).

This Court has previously demonstrated its regard for these principles by overturning a decision of the Oklahoma Court of Criminal Appeals which denied a defendant due process of law. In *Eaton v. City of Tulsa*, 415 U.S. 697, 94 S.Ct. 1228, 39 L.Ed.2d 693 (1974), this

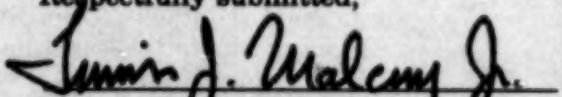
Court held that the Oklahoma court denied due process when it upheld a contempt conviction on charges not laid in the contempt citation. And,

> "There is no distinction in princple between determining a cause upon issues not raised by the pleadings in the actual absence of the party and rendering a decree by refusing to permit a defendant to be heard in his defense or to consider the merits of a sufficient defense...."

Hovey v. Elliot, 167 U..S 409, 446, 42 L.Ed 215, 231 (1897). In Petitioner's direct appeal to the Texas court below, that court did nothing less than to refuse him the right to be heard or to consider the merits of his Ground of Error No. 6.

Because of the denial of due process by the appellate court below, this Court should grant the writ of certiorari and remand the case to the Texas Court of Criminal Appeals for consideration of the merits of this Ground of Error No. 6.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, a member of the bar of this Court, in accordance with Rules 28.3 and 28.5(b), Supreme Court Rules, certify that three true and correct copies of the foregoing Petition for Writ of Certiorari were served on the parties involved in

this case on the 19th day of July
_____, 1982, by placing same in the United States Mails, first-class postage prepaid, addressed to the Honorable Henry Wade, District Attorney, Dallas County Courthouse, Dallas, Texas 75202.

Francis J. Maloney Jr.
Francis James Maloney, Jr.

RAMON CERVANTES, Appellant
No. 59,838 v. Appeal from DALLAS County
THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for criminal solicitation of capital murder. See Soc. 15.03, V.T.C.A. Penal Code. The jury assessed punishment at fifteen years confinement in the Texas Department of Corrections. The sufficiency of the evidence is not challenged.

The State's principal witness, Michael Moore, testified that on October 5, 1976 he received a phone call from a man who was later identified as the appellant. The appellant indicated to Moore that he wanted a man killed and inquired whether Moore could handle the task. The appellant discussed the amount of money Moore would charge. Appellant gave Moore the business address, a description of two automobiles and their license numbers and a physical description of the intended victim. Appellant also told Moore that although he had already paid someone else several times to complete the job, his money had been stolen, and further if Moore was unable to complete the job, he'd just do it himself. Finally, appellant told Moore he would call back in several days.

Later that same day, Moore went to the address given to him by the appellant. Moore followed a man, fitting the description given him, to a residence on Loch Ness Drive, Dallas. Moore subsequently obtained the intended victim's name, John Ralston, Sr., and phone number and the names and phone numbers of the people who lived on either side of the intended victim, from a criss-cross directory. The appellant was one of Ralston's neighbors. Moore then called John Ralston to warn him. Moore next contacted Lieutenant Roy Westphal to inform him of the telephone call. Moore met with Westphal, Lieutenant Southall and Sergeant Parker at Westphal's home. The police officers asked Moore to cooperate in their investigation, and Moore agreed to record any future telephone conversations.

On October 7, 1976, Moore received a second phone call from the appellant, which he recorded. The appellant told Moore there would be a slight delay because his intermediary had stolen the $1,000 payment intended for Moore. The appellant said he had his brother-in-laws, who worked for the police department, looking for the thief. Appellant indicated he wanted "the guy", Ralston, killed "C.O.D.", or he'd do it himself, because he was tired of losing his money.

On Saturday, October 16, 1976, Southall came to Moore's apartment and instructed him to make a phone call to the appellant. Moore placed the call, however, the appellant was not at home. Later the same day, Moore placed a second call and was able to speak to the appellant. The appellant told Moore that because his phone was bugged, they shouldn't talk. Moore told the appellant he would need a payment because he'd already spent some money. The appellant promised to call Moore on Thursday, October 21, 1976.

On October 21, 1976, Moore did not receive a phone call from the appellant. As a result, Officer Fowler, Officer Touchton, and Southall instructed Moore to phone the appellant. Moore spoke with the appellant's wife and told her to "jump on the appellant with both feet when he returned" and have him call Moore.

On Saturday, October 23, 1976, Moore placed a call to the appellant at 2:30 a.m., without the direction of the police. Moore asked the appellant why he had not returned Moore's phone call. Moore indicated to the appellant he wanted to get the ball rolling. He then told the appellant to look in his mailbox because he'd find a beer cup Moore had placed there. Appellant had never told Moore where he lived. Moore explained to the appellant that he wanted to know as much about the people he does business with as those he does business on. Moore told the jury he placed the beer cup in appellant's mailbox because he was tired of waiting around and was afraid the appellant would shoot Ralston.

Later that morning at 8:30, the appellant returned Moore's call. The appellant told Moore he had an additional job for him. The appellant wanted another

man badly beaten and his legs broken. Moore requested that he and appellant meet face to face to discuss their business.

At 1:30 p.m. that day, appellant again called Moore to make arrangements to meet. Appellant again requested Moore to put a second man in the hospital, in addition to the intended killing. Moore and appellant agreed to meet in the parking lot of a Denny's Restaurant at 2:30 that afternoon.

Officer Southall equipped Moore with a body mike in order to tape the conversation at the meeting. The officers also brought a surveillance vehicle to the parking lot in order to videotape the meeting. Southall searched Moore to verify that he had no money with him when he went to the meeting.

The recording of the conversation during the meeting revealed the following: the appellant told Moore that he used to tape single-edged razor blades between his fingers and slap people across the face. He also liked to take a blade and cut people across the forehead and when blood ran into their eyes he would then "kick the hell out of them."

The appellant also indicated that he wanted John Allen Ralston, the son of the intended victim, to be put into the hospital by Moore, for the same amount of money being paid to kill John C. Ralston.

Regarding the murder for hire, the appellant discussed how Moore might kill the intended victim. Appellant said he had aimed a gun at Ralston before but because of his poor eyesight, Ralston had not seen him. The appellant suggested that Moore stab or shoot Ralston or use any method Moore preferred; however, the appellant prefered that Ralston be put in a concrete jacket and thrown in the river. The appellant told Moore to go ahead and kill Ralston that night because he had arranged to be out of town. The appellant gave Moore two hundred dollars during this meeting.

The appellant was arrested the following evening at his home.

The appellant testified that during the initial phone call he did not request Moore to kill anyone. The appellant said Moore indicated he could "hassle" the intended victim. The appellant told the jury he realized the idea was crazy and intended to abandon the plan. The appellant assumed after the first call he'd never hear from Moore again because Moore did not have the appellant's name or phone number. The appellant asserted that Moore made several unrecorded phone calls to his home prior to the appellant's October 7th phone call to Moore. The appellant explained that he told Moore, in the October 7th conversation that someone had stolen his money in order to discourage Moore. The appellant thought if Moore knew he had no money, Moore would quit calling. The appellant said he had no intention of ever calling Moore again after the conversation on October 7th.

Regarding the subsequent calls from Moore, the appellant said he told Moore the phone was bugged to further discourage him. When Moore began asking the appellant for money, the appellant said he felt he was being blackmailed. Because of the October 23rd phone call from Moore at 2:30 a.m., the appellant said he felt his family was endangered. The appellant felt the only way to get rid of Moore was to pay him two hundred dollars, hoping Moore would no longer call the appellant.

In the first three grounds of error appellant contends the court erred by restricting his cross-examination of the State's principal witness, Moore, which would have shown his bias and motive for testifying at the trial. Ground of error one argues the appellant should have been allowed to cross-examine Moore regarding the dismissal of a weapons charge to establish that the dismissal was in return for his cooperation with the Dallas Police Department. In a pre-trial hearing on the State's Motion in Limine, it was adduced that Moore had been charged on October 29, 1974 with the offense of unlawfully carrying a weapon; however, this charge was dropped in January of 1975. In ground of error two the appellant contends that cross-examination of Moore by the appellant regarding the dismissal of an assault charge should have been allowed. Moore had been

charged with the offense of assault on September 13, 1976. This charge was dismissed on October 6, 1976, one day after appellant's initial contact with Moore. The record reveals that an affidavit of non-prosecution in the assault case was signed by the complaining witness on September 17, 1976. Appellant also argues cross-examination regarding Moore's prior arrest record would have shown Moore's history of violence and cooperation with the police and, therefore, establish his motive for cooperating with police in the instant case.

Great latitude should be allowed the accused to show a witness' bias or motive for testifying against the accused. See *Rovinsky v. State*, 605 S.W.2d 478 (Tex.Cr.App. 1980); *Carrillo v. State*, 591 S.W.2d 876 (Tex.Cr.App. 1979); *Coleman v. State*, 545 S.W.2d 831 (Tex.Cr.App. 1977). Trial courts, however, are allowed considerable discretion over the extent to which a witness may be cross-examined on a collateral matter for the purpose of showing bias and possible motives for fabrication. See *Rovinsky v. State*, *supra*; *Carrillo v. State*, *supra*.

In general, unadjudicated criminal offense may not be used to impeach a witness in a criminal case. See Art. 38.29, V.A.C.C.P.; *Bilbrey v. State*, 594 S.W.2d 754 (Tex.Cr.App. 1980); *Carrillo v. State*, *supra*. Evidence of pending charges against a witness, however, is admissible under certain circumstances because the witness' vulnerable status affords a basis for an inference of undue pressure, thus showing the possibility of interest and motive of the witness for testifying as he did. See *Randle v. State*, 565 S.W.2d 927 (Tex.Cr.App. 1978); *Castro v. State*, 562 S.W.2d 252 (Tex.Cr.App. 1978); and *Evans v. State*, 519 S.W.2d 252 868 (Tex.Cr.App. 1975).[1]

[1]Appellant also cites Davis v. Alaska, 415 U.S. 308, S.Ct. 1105, 39 L.Ed.2d 347 (1974). In *Davis*, the United States Supreme Court held the defendant should have been allowed to present evidence of the witness' status as a juvenile probationer at the time of his testimony. In the instant case, Moore admitted on cross-examination before the jury that he was on probation at the time he was cooperating with the police on the instant case.

Further, in *Simmons v. State*, 548 S.W.2d 386 (Tex.Cr.App. 1977), this Court held that the trial court erred by refusing to permit the defendant to perfect a bill of exceptions as regarding three prior arrests, even though the charges had been dismissed. This Court stated that the defendant should have been permitted to explore the possibility, in a bill of exceptions, that the dismissal of the charges was a quid pro quo for the witness' testimony. Additionally, this Court noted the charges could have been refiled, thus suggesting possibility of pressure on the witness. Subsequently, this Court in *Carrillo v. State, supra*, distinguished *Simmons*, stating that although the prosecution witness in *Carrillo* was still subject to prosecution for receiving stolen property because the statute of limitations had not run, the defendant had been permitted to fully explore in his bill of exceptions the possibility that no charges had been brought against the witness as a quid pro quo for their testimony. Further, this Court, indicated because this exploration presented no evidence of any agreement between the State and prosecution witnesses, the defendant was asking the trial court to permit him to impeach the prosecution witness on the basis of speculation as to the pressure the witnesses might have felt to testify favorably for the state.

This Court's reasoning in *Carrillo v. State, supra*, is applicable to the instant case.

In the instant case, the appellant was allowed to fully explore Moore's prior arrest record and the dismissal of charges in a bill of exception. The appellant also was allowed to cross-examine Moore, outside the presence of the jury, as to whether his cooperation with the police was prompted by an agreement with the State to avoid prosecution. Moore denied ever discussing with Officer Westphal, the weapons charge that was pending against him while he was acting as an informant for Westphal. Moore further stated Westphal was not aware of any charges pending against him. The cross-examination of Moore before the jury revealed that Moore had been in

fights, put people in the hospital and carried a gun on occasion. Moore admitted that he was on felony probation at the time that he was having the telephone conversations with the appellant. Moore indicated that Lieutenants Westphal and Southall had told him they would send letters to the probation office in order to help him obtain early release from probation. Such letters, however, were never sent. Although Moore admitted to working for Westphal as an informant in the past, he denied receiving any favors or help in relation to that prior action as an informant. In the bill of exception, Moore's probation officer testified he never spoke with any officers regarding the discharge of Moore from probation. In the absence of any evidence linking the dismissal of charges against Moore to his cooperation in the investigation of appellant, the trial court did not abuse its discretion in excluding the profferred impeachment testimony. See *Carrillo v. State, supra.* As this Court stated in *Carrillo v. State, supra*, the appellant was asking the trial court to permit him to impeach Moore on the basis of speculation as to the pressure he might have felt to cooperate in the investigation and to testify favorably.

Grounds of error one, two and three are overruled.

Ground of error four contends the trial court erred in excluding impeachment evidence that the witness Moore had been arrested for impersonating a police officer. Unadjudicated criminal offenses may not be used to impeach a witness in a criminal case. See Art. 38.29, V.A.C.C.P. *Carrillo v. State, supra*; *Murphy v. State*, 587 S.W.2d 718 (Tex.Cr.App. 1979). In *Simmons v. State, supra*, the court held the defendant should have been permitted to explore the dismissed charges because they could have been refiled, while in the instant case the statute of limitations on the arrest for impersonating a police officer had run and the charges could not be refiled.[2]

[2]Moore had been arrested in 1973 for impersonating an police officer four years prior to the trial. See Art. 12.01 (4), Vernon's Ann.C.C.P.

Ground of error five contends the court erred in failing to suppress evidence of extraneous offenses which were admitted on the tape recordings of appellant's conversations with Moore on October 23, 1976 during the meeting at Denny's Restaurant. Appellant had boasted that he used to slap people on the forehead with razor blades and cut them on the forehead with knives so blood would run into their eyes. He also told how he had aimed guns at the intended victim without being seen.

Generally, evidence of extraneous offenses committed by the accused are inadmissible; however, refutation of a defensive theory is a recognized exception to that general rule. *Thrush v. State*, 515 S.W.2d 122 (Tex.Cr.App. 1974); *Powers v. State*, 508 S.W.2d 377 (Tex.Cr.App. 1974); *Albrecht v. State*, 486 S.W.2d 97 (Tex.Cr.App. 1972). In the instant case the appellant's testimony raised the defense of duress and entrapment. Although evidence of other criminal acts is no longer admissible to rebut the claim of entrapment, *Bush v. State*, 611 S.W.2d 428 (Tex.Cr.App. 1981); *Langford v. State*, 571 S.W.2d 326 (Tex.Cr.App. 1978), such evidence is admissible to rebut the defense of duress. This Court must, however, determine what extraneous offenses were admissible to refute the defense of duress. In *Albrecht v. State*, 486 S.W.2d 97 (Tex.Cr.App. 1972), this Court stated the relevant question is whether the extraneous offense tends to disprove the appellant's explanation of the primary offense. The presence or absence of similarity does not completely determine the admissibility of the extraneous offense. The extraneous offense, if relevant in tending to disprove the defensive theory, should be admissible. See *Halliburton v. State*, 528 S.W.2d 216 (Tex.Cr.App. 1975), (opinion on rehearing). The essence of the conversation in question indicated that the appellant was discussing and suggesting the manner in which the killing might be accomplished. Discussing the best place to commit the murder, the appellant commented on the poor eye sight of the victim and told how he had aimed guns at him without being seen. He indicated to Moore that if Moore

could get Ralston's glasses off, Ralston would not be able to see, thus making him easier to kill. Pointing the gun at the victim was not unrelated to the offense on trial and, therefore, the conversation relating to it was admissible. *Thrush v. State, supra.*

Regarding the conversations referring to the razor blade incidents, this Court has held that extraneous offenses could be admitted:

> (1) To show the context in which the criminal act occurred—what has been termed the 'res gestae'—under the reasoning that events do not occur in a vacuum and that the jury has a right to hear what occurred immediately prior to and subsequent to the commission of that act so that they may realistically evaluate the evidence . . ." *Albrecht, supra* at 100.

In *Saunders v. State*, 572 S.W.2d 944 (Tex.Cr.App. 1978), this Court held the extraneous offenses included in the tapes were inadmissible because they revealed both the tenor and setting in which the conversations between the defendants and the officers took place. In the instant case, the challenged conversations showed the context in which the criminal activity occurred. The appellant referring to the razor blade incidents, explained to Moore that he was no longer a pro at this sort of thing, therefore, he needed someone else to do his work for him because he had not kept up on new techniques. Thus, the extraneous offenses involving razor blades and cuttings were admissible under the exception contained in *Albrecht*, set out above. *Saunders, supra*; *Calverly v. State*, 511 S.W.2d 60 (Tex.Cr.App. 1974).

Ground of error six contends the trail court erred in unreasonably limiting the voir dire examination of the prospective jurors. Specifically, the appellant asserts he should have been allowed to question the members of the voir dire individually regarding their ethnic prejudices.

Under Art. 35.17, V.A.C.C.P. it is within the court's discretion to direct the State and defendant to conduct the voir dire examination of prospective jurors in the presence of the entire panel. Only in a capital felony case must the trial court, on demand by the State or defendant, allow examination of each juror on voir dire individually and apart from the entire panel. See *Brantley v. State*, 522 S.W.2d 519 (Tex.Cr.App. 1975); *Wechsler v. State*, 361 S.W.2d 379 (Tex.Cr.App. 1962).

In the instant case, the trial court did not restrict any specific questions presenting the matter of prejudice to the jury. On the contrary, the appellant was allowed to ask the following:

> "Is there anyone who because of any reason has any type of prejudice or ill feelings toward a Mexican-American because of his ethnic background? Yes, sir, and what is your name, please, sir?
>
> MR. MOORE: Dean Moore.
>
> MR. SCOGGINS: Dean Moore?
>
> MR. MOORE: Uh-huh.
>
> MR. SCOGGINS: Mr. Moore, I'll then, as I stated, ask you the second question, if this feeling that you have, can you set this aside and if you sit in judgment on this Mexican-American, could you do this fairly and impartially without regard to whatever your other ideas may be? Or is it the type of matter in which you feel like that you probably shouldn't sit in judgment of your fellow man?"
>
> * * *
>
> ... Now let me ask the first question again: Is there anyone who does have a prejudice against a Mexican-American because of the group that they happen to fall into? Is there anyone else? Or let me rephrase the question in a different manner: Is there anyone here who has a particular bias or

prejudice in favor of a Mexican-American that would give him a greater benefit of the doubt than he might be entitled to after hearing the evidence? Is there anyone who is of that opinion? I take it by your silence then that the group that I'm talking to, no one here would be influenced because the man whose case is called to trial is a Mexican-American, and I appreciate that fact and I'm sure the Prosecution does as well."

Prior cases reversed by this Court for the limitation of voir dire examination in a non-capital felony, were done so because the trial court refused to allow the asking of a particular question. *Emanus v. State*, 562 S.W.2d 806 (Tex.Cr.App. 1975). There was no such limitation of questioning in the instant case,[3] therefore, the trial court did not abuse its discretion in directing that the voir dire examination be conducted in the presence of the entire panel. *Johnson v. State*, 447 S.W.2d 927 (Tex.Cr.App. 1969). This ground of error is overruled.

Ground of error seven contends the trial court erred in not finding entrapment as a matter of law.

In the instant case, the issue of entrapment was raised by the appellant's testimony that he had given up the idea of killing Ralston and that had it not been for Moore's repeated phone calls and requests for money, he never would have met with Moore nor given him any money. When determining whether there was entrapment as a matter of law, the trial court must first determine whether there was an inducment. If the court determines there was an inducement, the court then need only consider the nature of the police activity involved without reference to the predisposition of the particular defendant. In the

[3]The U.S. Supreme Court stated in Restairo v. Ross, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976), that voir dire questioning directed to racial prejudice is not constitutionally required absent circumstances comparable in significance to those existing in Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).

present case, the State contradicts the appellant's evidence of inducement. Once the appellant contacted Moore to initite the scheme, the fact that Moore provided an opportunity for the appellant to continue was not entrapment as a matter of law.

Evidence on the issue of entrapment was in conflict so it was properly submitted to the jury. *Poe v. State*, 513 S.W.2d 545 (Tex.Cr.App. 1974); *McKelva v. State*, 453 S.W.2d 298 (Tex.Cr.App. 1970).

Ground of error eight contends the trial court erred in admitting evidence of tape-recorded conversations between the appellant and Moore. Appellant first contends the challenged evidence violated his constitutional and statutory rights to be free from unreasonable searches and seizures, arguing that Art. I, Sec. 9 of the Texas Constitution or Art. 38.23, V.A.C.C.P. affords greater protection than the United States Constitution.

In *Schwartz v. State*, 426 S.W.2d 174 (Tex.Cr.App. 1951), aff'd 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952), this Court, considering a predecessor to Art. 38.23, held recordings of conversations obtained with the permission of one party to the conversation was not obtained in violation of the State or Federal Constitution or the Statutes of Texas and were therefore admissible. *Saunders v. State*, 572 S.W.2d 944 (Tex.Cr.App 1978); *Thrush v. State, supra*. The admission of the recordings did not violate the Texas Constitution or statutes.

The appellant also urges the admission of the tapes violated his right to due process, citing *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) in support of his argument. The Supreme Court in *Russell*, referring to entrapment, stated only that some day that Court may be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would bar even the initiation of prosecution. In the instant case, we did not find entrapment as a matter of law. Furthermore, as in *Russell*, the police conduct in the instant case in

obtaining the tape recordings "stops short of violating that 'fundamental fairness, shocking to the universal sence of justice,' mandated by the Due Process Clause of the Fifth Amendment." *United States v. Russell, supra* at 432; 93 S.Ct. at 1643, 36 L.Ed. at 373. This ground of error is overruled.

Ground of error nine asserts the trial court erred in refusing to instruct the jury to disregard the prosecutor's question referring to defense experts, because such question was an attempt to bolster the credibility of unimpeached tapes. During the cross-examination of the appellant, the prosecutor asked the following:

> Q. Now, you've heard these tapes before the trial, is that correct? You've heard—
>
> A. Part of them.
>
> Q. Part of them. Well, you know that the Judge has ordered me to turn the tapes over before the trial and I've turned them over to your attorney, copies of them; he made copies of them, is that correct?
>
> A. My attorney's been handling that portion of it.
>
> Q. And you hired an expert to examine these tapes.
>
> A. My attorney—

Appellant's objection was sustained, however, the trial court failed, as requested by the appellant, to instruct the jury to disregard the question.

This Court has held the mere asking of a question will not call for reversal unless the same results in obvious harm to the defendant. *Rodriguez v. State*, 577 S.W.2d 491 (Tex.Cr.App. 1979); *Ashley v. State*, 527 S.W.2d 302 (Tex.Cr.App. 1975); *Fuller v. State*, 501 S.W.2d 112 (Tex.Cr.App. 1973). In the instant case, the appellant's objection was sustained and the matter was not pursued by the prosecutor. Although the trial court did not

instruct the jury to disregard the question, we do not find the question was so obviously prejudicial as to require reversal. This ground of error is overruled.

In ground of error ten the appellant contends the trial court committed fundamental error in failing to define "capital felony" in its charge to the jury. The trial court did define capital murder, in its charge. Because the record reflects that no objection was made to the charge at trial, our review is limited to fundamental error. In *Jackson v. State*, 591 S.W.2d 820 (Tex.Cr. App. 1979), this Court stated:

"A jury charge is fundamentally defective when it:

> (1) authorizes conviction without proof of an allegation in the indictment which is required to be proved;
>
> (2) authorizes conviction on a different theory than alleged in the indictment and on additional unalleged theories;
>
> (3) authorizes conviction on the theory alleged in the indictment and on additional unalleged theories;
>
> (4) authorizes conviction for conduct which is not an offense."

Failing to define a term did not authorize a conviction in one of the four fundamentally defective manners as set out above. See *Jackson v. State*, *supra*; *Cumbie v. State*, 578 S.W.2d 732 (Tex.Cr.App. 1979). This ground of error is overruled.

In his final ground of error appellant contends the trial court committed fundamental error in its charge by omitting a culpable mental state, thereby authorizing conviction on less than all the facts alleged in the indictment. The indictment, in pertinent parts, reads as follows:

> "...did then and there unlawfully then and there with *intent* that a capital felony be committed, namely, capital murder by employment of another to commit murder for the promise of remuneration, the said defendant *intentionally* requested and attempted to induce Michael Moore to engage in specific conduct that under the circumstances surrounding the conduct of Michael Moore, as the defendant believed them to be, would make Michael Moore a party to the commission of the said felony, to-wit: the said defendant *intentionally* requested and attempted to induce Michael Moore to commit the murder of John C. Ralston for the promise of remuneration, to-wit: $2,000.00 current money of the United States of America." (Emphasis added)

The indictment included the culpable mental state three times. The court charged the jury in the terms of the indictment, however, omitted the first "intentional." Although the culpable mental state, intentionally, was omitted once in the charge, it is included two other times. In *Daniel v. State*, 486 S.W.2d 944 (Tex.Cr.App. 1972), this Court stated:

> "the charge should be viewed as a whole, and review should not be limited to parts of the charge standing alone."

Considered in its entirety, the charge does not present fundamental error. See *Williams v. State*, 535 S.W.2d 352 (Tex.Cr.App. 1976). Compare *West v. State*, 567 S.W.2d 515 (Tex.Cr. App. 1978) where the charge was fundamentally defective because nowhere in the charge was a culpable mental state included. We overrule this ground of error.

The judgment is affirmed.

PER CURIAM

Delivered April 14, 1982

By: Panel 2; 1st Quarter, 1981

Carl E. F. Dally, Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge

APPENDIX
30

ORDER DENYING MOTION FOR REHEARING

AND

GRANTING STAY OF MANDATE FOR 30 DAYS

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, May 26, 1982

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the Appellant's Motion for Rehearing in Cause No. No. 59,838 RAMON CERVANTES

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

THOMAS LOWE, Clerk

GROUND OF ERROR NO. 6

THE COURT ERRED IN UNREASONABLY LIMITING THE VOIR DIRE EXAMINATION OF THE PROSPECTIVE JURORS IN VIOLATION OF APPELLANT'S RIGHTS UNDER ARTICLE 1, SECS. 10, 15, AND 19 OF THE TEXAS CONSTITUTION AND THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Although both sides were allowed to address the panel of prospective jurors as a group, the trial judge forbade the directing of questions to panel members individually (S.F. 4), to which Appellant excepted (S.F. 4). Prior to beginning his own voir dire examination of the panel, defense counsel renewed his objection and tendered a list of questions he wished to ask each prospective juror (S.F. 35-38). One of the most important questions counsel was refused the right to ask concerned the existence in any venireman's mind of racial prejudice toward Spanish-surnamed individuals (S.F. 36). Because of the limitations imposed by the court, counsel was unable effectively to exercise his peremptory strikes. Although no harm resulting from an error such as this need be shown, *Emanus v. State*, 526 S.W.2d 806 (1975), *Smith v. State*, 513 S.W.2d ;823, 826 (1974). Appellant later learned that several unacceptable jurors, including a 32nd degree mason, were seated on the jury (Appellant's Second Amended Motion for New Trial, Tr. 124, 126).

This case thus presents an error in the unreasonable restriction of voir dire examination, not in an erroneous ruling on a challenge for cause. The case is therefore controlled by *Emanus v. State, supra*, where it was said:

> "The test for ascertaining harm in (cases of restricted examination) is whether the trial judge's limitation of the voir dire examination amounted to an abuse of discretion, thus depriving Appellant of a valuable right."

APPENDIX C
EXCERPT FROM APPELLANT'S ORIGINAL BRIEF

Id. at 808. If the proferred questions in this case were proper for individual voir dire, the harm arose in preventing the Appellant from intelligently exercising his peremptory strikes. See *Smith v. State*, 513 S.W.2d 823 (1974); *Burkett v. State*, 516 S.W.2d 147 (1974).

Recent guidance on the propriety of Appellant's proposed questions can be found in the cases of *Florio v. State*, 568 S.W.2d 132 (No. 54,084; July 12, 1978); *Hernandez v. State*, 563 S.W.2d 947 (No. 52,802; April 12, 1978); and *Trevino v. State*, ___ S.W.2d ___ (No. 54, 148; April 5, 1978), all involving an unreasonable restriction of the voir dire examination which amounted to an abuse of discretion. In all three cases, the defendants were refused the right to ask prospective jurors if they would more readily believe police officer witnesses. It will be remembered that Appellant was refused the right to ask individual panel members about their social prejudices. Any doubt that this is a proper area for voir dire inquiry can be resolved by the cases of *Salazar v. State*, 562 S.W.2d 480 (1978)(where reversal was required when a juror failed to reveal during voir dire in an indecency with a child case that he had witnessed a Mexican-American sexually attack his own daughter); and *Abron v. State*, 523 S.W.2d 405 (1975)(where a black defendant accused of raping a white woman was refused the right to question prospective jurors about specific racial prejudices.).

The trial court's limitation of Appellant's voir dire examination of the prospective jurors was therefore erroneous. Since the trial judge did not prohibit any specific voir dire questioning, but instead limited the examination of the prospective jurors to surveying the panel as a whole, the issue narrows whether the denial of Appellant's motion for individual voir dire examination (S.F. 35-38) was an abuse of discretion of the same magnitude as an unreasonable prohibition of substantive questions.

While Appellant *was* permitted to question the panel at length (S.F. 40-80) on the issues of racial prejudice, inferences of guilt from the indictment or the seriousness of the charged offense, entrapment, and prejudice in

favor of law enforcement officers, this group interrogatory was ineffective and inadequate. The record shows, for instance, that only one juror admitted racial bias against Mexican-Americans (S.F. 42-44). The inherently inhibiting and intimidating nature of peer pressure, such as that operating on a large panel of prospective jurors, made it unlikely that individual veniremen would candidly respond to sensitive questions addressed to the panel as a whole. Fear of exposure, embarrassment and informal censure possibly deriving from a public admission of prejudice or bais rendered the en masse probing ineffectual. While the trial court has discretion to control the voir dire examination, the discretion is abused when the defendant's privilege of examining the veniremen individually is denied.

In *De La Rosa v. State*, 414 S.W.2d 668 (1967), the Court held that a 30 minute limitation on individual voir dire examination was reversible error. In *De La Rosa*, as in the instant case, Appellant's counsel "requested the Court to allow him to propound approximately fifteen questions which he set out in his motion." *De La Rosa* at 670; (S.F. 35-37). In *De La Rosa* as well as the intant case, there was no attempt to prolong the voir dire with irrelevant, immaterial or unnecessarily repetitious questions. *De La Rosa* at 671; (S.F. 38-80). The Court recognized in *De La Rosa* that effective voir dire examination is an essential element of the right to jury trial, stating that:

> [t]he voir dire process is designed to insure—to the fullest extent possible—that an intelligent, alert and impartial jury will perform the duty assigned to it by our judicial system.

Id. at 671. Moreoever, the Court noted that "(i)t is well-established by numerous decisions of this Court that (the) constitutional guarantee of the right to be represented by counsel carries with it the right of counsel to *interrogate the members of the jury panel*" (emphasis supplied), so that peremptory challenges might be effectively exercised. See also *Mathis v. State*, 322 S.W.2d 629, 639

(1959). Due process violations of the state and federal constitutions are also implicated by the conduct of the trial court in this case. *Abron v. State*, 528 S.W.2d 405 (1975). "Any system for empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of (the right to challenge veniremen) must be condemned." *Pointer v. United States*, 151 U.S. 396, 408 (1894). Thus, Appellant's constitutional rights to counsel, trial by jury, and due process of law were infringed by the trial court's actions in this case.

The court in *De La Rosa* explicitly rejected the distinctiocn between a trial court's prohibition of proper substantive questioning and a trial court's limitation of the *method* of questioning, by observing that

> [t]he unrealistic time limitation here imposed had the same effect, however, of *depriving the appellant* of *asking the prospective jurors individually proper and pertinent questions.* (Emphasis supplied)

Id. at 672. The duty of the trial court to confine the voir dire examination to reasonable limits, the Court noted,

> does *not* carry with it, however, the authority to refuse appellant's counsel the *privilege of examining each juror individually* within reasonable limits. (Emphasis supplied)
>
> *Id.* at 672.

The case of *Plair v. State*, 102 Tex.Cr.R. 628, 279 S.W. 267 (1926) in on all-fours with the instant case. There, the defendant was similarly alleging that the trial court erred in refusing to permit him to examine individually each of the prospective jurors in order that he might intelligently exercise his peremptory challenges. The defendant especially complained that the trial court refused to permit him to ask each of the jurors *separately* whether they had any racial prejudice. Holding that the trial court's action in refusing the individual examination and substituting in its place collective interrogatory was

reversible error, the Court acknowledged the type of peer pressure inherent in large panels of prospective jurors:

> We think no case can be found in the state where it has been held permissible for the trial court to refuse to allow counsel to examine the jurors individually as to their qualification. *We think the distinction is clear between an examination of this character and the mere asking of jurors the same questions in a group. There is a certain degree of timidity and diffidence about some jurors that would be calculated to cause them to remain silent unless personally called upon* to answer any question. Again we think it clear that the right to appear by counsel carries with it the right of counsel to interrogate each juror individually, to the end that he may form his own conclusion *after this personal contact with the juror* as to whether, in the counsel's judgment he would be acceptable to him, or whether on the other hand he should exercise a peremptory challenge to keep him off the jury. (Emphasis supplied)

Id. at 269. The fact that the trial judge in the instant case was willing to allow Appellant to pursue responses individually if such a response resulted from the group voir dire does not distinguish the instant case from *Plair*. The trial judge in *Plair* propounded questions to the jurors collectively, "with an admonition that the questions were directed to each individually, and for any one to speak up and answer, *which was done*." *id.* at 268 (Emphasis supplied). This procedure was nonetheless held to be reversible error. *In accord*, *Naugle v. State* 40 S.W.2d 92, 94 (1931); *Carlis v. State*, 51 S.W.2d 729, 730 (1932).

De La Rosa has been consistently and frequently cited by this Court and was affirmed in *Hernandez v. State*, 508 S.W.2d 853, 854 (1974); *Barrett v. State*, 516 S.W.2d 181, 183 (1974)(Onion, P.J., dissenting). And *Plair* was

reaffirmed as recently as April 5, 1978 in *Trevino v. State*, 572 S.W.2d 336 (No. 54,148).

For the reasons stated, the cause should be reversed and remanded.

STATE'S COUNTERPOINT NO. 6

(In Reply to Appellant's Ground of Error No. 6)

NO ERROR WAS COMMITTED DURING THE VOIR DIRE OF THE PROSPECTIVE JURORS.

The Appellant next states that the trial judge unreasonably restricted the voir dire examination. More specifically, he contends that "... the trial judge forbade the directing of questions to panel members individually . . ." (Brief p. 23).

Prior to the voir dire examination, the trial judge ruled, as follows:

> You may ask these questions collectively of the jurors as a group and if there is an individual response in the affirmative or negative from any individual juror, then you may proceed with a follow-up question of that particular juror.' (S/F 37-38).

Thus, the defense was not, in fact, prohibited from asking the individual jurors any specific questions. Moreover, the record reflects that some veniremen were also questioned outside the hearing of the others. (S/F 42, 53, 54, 55, 62, 64). The record also shows that the defense was permitted to individually question the veniremen when they responded to the general questions. (S/F 65 et. seq.).

As stated in *Abron v. State*, 523 S.W.2d 405 (Tex.Cr.App. 1975): "This Court has consistently held that the trial court has wide discretion over the course of the voir dire of the jury panel." The procedure followed in the present case did not constitute an abuse of discretion by the trial court. See *United States v. Arlt*, 567 F.2d 1295 (5th Cir. 1978); see also the cases collated at 25 Texas Digest, Jury, Section e31(13).

APPENDIX D - EXCERPT FROM STATE'S ORIGINAL BRIEF

GROUND OF ERROR NO. 6

In this ground, appellant complained of the court's refusal to permit questioning of *individual* veniremen as to questions such as ethnic prejudice during his voir dire examination of the entire venire panel as a group. The trial court had ruled that such examination would not be allowed unless indicated by specific responses to the examination of the venire panel as a whole. Appellant cited cases reversed for refusal to permit the asking of certain questions, *e.g.*, *Emanus v. State*, 526 S.W.2d 806 (1975), *Florio v. State*, 568 S.W.2d 132 (1978), as well as cases reversed for imposition of other limitations on the voir dire examination, *e.g.*, *De La Rosa*, 414 S.W.2d 668 (1967)(30 minute time limitation), *Plair v. State*, 279 S.W. 267 (1926)(veniremen could not be questioned individually unless they made a particular response to group interrogatories).

THE PANEL OPINION MISSED THE BOAT

Incredibly, the panel either deliberately ignored or misunderstood 1) what actually happened in the trial court, 2) the totality of appellant's argument on appeal, and 3) all of the cases in the second category cited above. The undersigned writer reaches this conclusion, in part, by noting the court's reliance on *Johnson v. State*, 447 S.W.2d 927 (1970), *Brantley v. State*, 522 S.W.2d 519 (1975) and *Wechsler v. State*, 361 S.W.2d 379 (1962) which held that voir dire examination of individual veniremen separate and apart from the rest of the panel is only appropriate in capital murder cases. This is indeed the law but this is *NOT* appellant's complaint on this appeal. The cases cited by the panel have nothing whatsoever to do with this case.

The panel's failure to address the issue actually raised in the appeal is all the more surprising since appellant informed the panel at oral argument on January 14, 1981, that Ground of Error 6 was his strongest ground. At that time, the panel propounded numerous questions to

counsel for both parties on this issue. Both parties filed post-argument briefs specifically addressing the difficult question presented in Ground of Error No. 6. The panel opinion is silent on both the facts and the law which both parties heretofore understood were presented by this ground of error.

APPELLANT'S GROUND RESTATED

As the panel opinion noted, appellant was permitted to ask his question about ethnic prejudice (of the venire as a whole). The panel therefore held that appellant's voir dire examination was not unduly limited, citing *Emanus v. State, supra.* But the panel did not consider whether appellant could direct his proper question to each member of the panel *individually*, during the group voir dire, or whether the court could require appellant to direct it to the venire as a whole, addressing only those specific veniremen who responded to the general interrogatory. This was the question presented both in this case and in *Plair v. State*, 279 S.W. 267 (1926). It would serve no purpose to recite pages of the trial record and appellate briefs to identify this question again; it is unmistakably preserved in the trial court and assigned as error in the briefs already on file with this Court.

MERITS OF APPELLANT'S ARGUMENT
GENERAL AUTHORITY

Voir Dire examination in non-capital cases in Texas has always included the right of counsel to propound proper questions to each individual member of the jury panel. *Plair v. State*, 279 S.W. 267 (1926)(on Rehearing).

> The right to appear by counsel is guaranteed by the (Texas) Bill of Rights, and carries with it the right of counsel, within reasonable limits to examine *each juror individually* in order that he may prepare himself for the exercise of the peremptory challenges allowed that appellant by statute. Article 1, § *10,*

Constitution of Texas, article 3, C.C.P. 1925; (citations omitted).

Carlis v. State, 51 S.W. 2d 729, 730 (1932)(emphasis supplied).

> It has been long the holding of this court that the constitutional guarantee of the right to be represented by counsel (Bill of Rights, Art. 1, Sec. 10, Vernon's Ann.St.Const.) carries with it the right of counsel to interrogate the members of the jury panel to the end that he may form his own conclusion, *after his personal contact with the juror*, as to whether in counsel's judgment he would be acceptable to him or whether, on the other hand, he should exercise a peremptory challenge to keep him off the jury. (citations omitted).

Mathis v. State, 322 S.W.2d 629, 631 (1959)(emphasis supplied) quoted by Judge Odom in *Abron v. State*, 523 S.W.2d 405, 408 (1975).

> [T]he right to appear by counsel carries with it the right of counsel to interrogate each juror *individually*, to the end that he may form his own conclusions after this personal contact with the juror as to whether, in the counsel's judgment, he would be acceptable to him, or whether on the other hand he should exercise a peremptory challenge to keep him off the jury.

Plair v. State, *supra* (emphasis supplied), quoted by Judge Dally in *Mathis v. State*, 576 S.W.2d 835 (1979). The right to individual questioning applies even if the questioning is repetitious.

> So long as the method of jury selection long used in this state prevails—as opposed to practice in federal court—defense counsel may not be precluded from the traditional voir dire examination because the

> questions asked are repetitious of those asked by the Court and prosecutor.

Mathis v. State, 576 S.W.2d 835, 839 (1979). If the Court within its discretion sets time limits on the voir dire examination, nevertheless,

> . . . within such limits the defendant may examine each prospective juror *individually* and pose questions about any proper area of inquiry.

Florio v. State, 568 S.W.2d 132 (1974)(per Odom, J.)(emphasis supplied).

MERITS OF APPELLANT'S ARGUMENT WHITE HORSE CASE

Plair v. State, *supra*, is on all-fours with the instant case. There, the defendant was similarly alleging that the trial court erred in refusing to permit him to examine *individually* each of the prospective jurors in order that he might intelligently exercise his peremptory challenges. The defendant especially complained that the trial court refused to permit him to ask each of the jurors *separately* (but during the group voir dire) whether they had any racial prejudice. Holding that the trial court's action in refusing the individual examination and substituting in its place collective interrogatory was *reversible error*, the Court acknowledged the type of peer pressure inherent in large panels of prospective jurors:

> We think no case can be found in the state where it has been held permissible for the trial court to refuse to allow counsel to examine the jurors *individually* as to their qualification. *We think the distinction is clear between an examination of this character and the mere asking of jurors the same questions in a group.* There is a certain degree of timidity and diffidence about some jurors that would be calculated to cause them to remain silent *unless personally called upon* to answer any question. Again we think it clear that the

> right to appear by counsel carries with it the right of counsel to interrogate each juror *individually*, to the end that he may form his own conclusion *after this personal contact with the juror* as to whether in the counsel's judgment he would be acceptable to him, or whether on the other hand he should exercise a peremptory challenge to keep him off the jury (emphasis supplied).

Id. at 269. The fact that the trial judge in the instant case was willing to allow appellant to pursue responses individually if such a response resulted from the group voir dire does not distinguish the instant case from *Plair*. The trial judge in *Plair* propounded questions to the jurors collectively, "with an admonition that the questions were directed to each individually, and for any one to speak up and answer," *which was done*." *id. at 268* (emphasis supplied). This procedure was nonetheless held to be reversible error.

This Court in *De La Rosa v. State*, 414 S.W.2d 668 (1967) reversed a conviction because the 30 minute time limitation for voir dire imposed by the trial court was not sufficient to accord the defendant his state constitutional right to counsel. The duty of the trial court to confine the voir dire examination to reasonable limits, the Court noted,

> does *not* carry with it, however, the authority to refuse appellant's counsel the *privilege of examining each juror individually* within reasonable limits. (emphasis supplied)

Id. at 672. *En masse* questioning of the entire panel is simply inadequate to ascertain factors such as intelligence, quickness, temperament, and subtle prejudices that individual questioning can pick up. Texas lawyers look for these qualities in picking a fair and impartial jury.

SUMMARY

The Court of Criminal Appeals, *en banc*, should consider the question raised by this appeal and should either distinguish or overrule *Plair* and *De La Rosa*. If the procedure actually employed by the trial court in this case really did receive express sanction by this Court, it would not be long before individual questioning of prospective jurors during group voir dire of the whole venire panel would be a thing of the past in Texas. Besides the major implications for voir dire practices in Texas contained in this appeal, there are also the rights of one individual criminal defendant to consider. The issues should not be avoided and buried in a *per curiam* opinion.

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NO. 82-115

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1981

RAMON CERVANTES,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S LIMITATION OF THE CROSS-EXAMINATION OF THE STATE'S PRINCIPAL WITNESS VIOLATED PETITIONER'S RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS?

II. WHETHER THE FAILURE OF THE TEXAS COURT OF CRIMINAL APPEALS TO CONSIDER ONE OF PETITIONER'S ARGUMENTS ON APPEAL DEPRIVED HIM OF DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL?

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To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW The State of Texas, Respondent herein, by and through her attorney, the Attorney General of Texas, and respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Texas Court of Criminal Appeals in this case.

OPINION BELOW

The judgment of the Texas Court of Criminal Appeals is attached to the petition for writ of certiorari as Appendix A.

JURISDICTION STATEMENT

The Petitioner seeks review by certiorari of a judgment of the Texas Court of Criminal Appeals entered April 14, 1982, in Appeal No. 59, 838, affirming Petitioner's conviction in Dallas County, Texas. A timely filed petition for rehearing was denied on May 26, 1982. This petition was filed on July 7, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V:

> No person shall ... be deprived of life, liberty, or property without due process of law ...

U.S. CONST. amend. XIV:

> ... no State shall make or enforce any law which shall abridge the privilages or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the offense of solicitation to commit capital murder alleged to have

occurred on or about October 23, 1976, in Dallas, Texas. 15.03 TEX. PENAL CODE (Vernon). He was convicted by a jury on November 9, 1977, in Criminal District Court No. 4 of Dallas County, Texas, and assessed fifteen years confinement in the Texas Department of Corrections. The sufficiency of the evidence is not challenged here.

The evidence adduced at trial established that the State's principal witness, Michael Moore, received a telephone call on October 5, 1976, from a man who was later identified as Petitioner. Petitioner indicated that he wanted a man killed, discussed the amount of money Moore would charge to handle the job, and gave Moore the business address, a physical description of the intended victim, and other information. Later that same day, Moore obtained the name of the intended victim, one John Ralston, Sr., and determined that he was one of Petitioner's neighbors.

After calling the intended victim to warn him, Moore contacted the Dallas Police Department, agreed to cooperate in their investigation of the phone call, and to record any future telephone conversations.

Over the next few weeks, the police recorded five conversations between Moore and Petitioner wherein they discussed the details of payment and the method of the intended killing. Petitioner also requested Moore to put a second man in the hospital, in addition to the intended killing. Moore and Petitioner agreed to meet in the parking lot of a Denny's Restaurant at 2:30 on the afternoon of October 23, 1976. The police investigators equipped Moore with a body-microphone in order to tape the conversation at the meeting, and also brought a surveillance vehicle to the parking lot in order to videotape the meeting. The recording of the taped conversation during this meeting revealed that Petitioner continued to discuss the murder for hire and the addi-

tional beating, and gave Moore $200. Petitioner was arrested at his home the following day.

During a pre-trial hearing on a motion in limine made by the State, and outside the presence of the jury, Petitioner made out a bill of exceptions which established that Moore had been charged on October 29, 1974, with a weapons offense which was dropped in January of 1975, and with the offense of assault on September 13, 1976, which was dismissed on October 6, 1976. The evidence also showed that Moore had been placed on three years probation for burglary on October 3, 1975, and received an early discharge from probation on February 24, 1977. The probation records indicated a number of other arrests for which charges were never filed. The trial court excluded the proffered impeachment evidence.

On appeal, Petitioner claimed that the trial court's action deprived him to his right to effective cross-examination under the Sixth Amendment to the United States Constitution and *Davis v. Alaska*, 415 U.S. 308 (1974), because he was denied an opportunity to establish the witness's possible bias or motive for testifying. The Texas Court of Criminal Appeals held that the trial court had not abused its discretion in limiting cross-examination, and had acted properly under Texas law and under *Davis v. Alaska, supra.* This petition for writ of certiorari followed.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE TRIAL COURT'S LIMITATION OF CROSS-EXAMINATION DOES NOT PRESENT A QUESTION WORTHY OF THIS COURT'S REVIEW.

A. The Court's Action at Petitioner's Trial Did Not Violate His Rights Under the Confrontation Clause of the Sixth Amendment.

At the outset, it should be recognized that the trial court at Petitioner's trial acted properly under state law. Recent Texas cases recognize the right of the defendant to establish any facts tending to establish ill feeling, bias, or motive on the part of a witness testifying for the State. *Coleman v. State*, 545 S.W.2d 831 (Tex.Crim.App. 1977). Trial courts, however, have traditionally been accorded broad discretion to dictate how such facts may be proved, and particularly where the proof involves collateral evidence. Accordingly, the Texas courts have employed a balancing test to accommodate the tension between two competing interests. The probative value of the evidence sought to be introduced must be balanced against the prejudicial impact of the evidence, including undue prejudice, embarrassment, harassment to either a witness or a party, and the possibility of undue delay. *Carrillo v. State*, 591 S.W.2d 876 (Tex.Crim.App. 1979).

In general, unadjudicated criminal offenses may not be used to impeach a witness in a criminal case. *See*, Article 38.29, TEX. CODE CRIM. PROC. (Vernon); *Bilbrey v. State*, 594 S.W.2d 754 (Tex.Crim.app. 1980). Though such evidence cannot be used to impeach a witness on the basis of general bad character or bad reputation, specific facts can be shown which tend to establish that the witness was under undue pressure or had entered into an agreement with the prosecution to testify on behalf of the State in a particular case. *See, e.g., Randell v. State*, 565 S.W.2d 927 (Tex.Crim.App. 1978); *Castro v. State*, 562 S.W.2d 252 (Tex.Crim.App. 1978). The procedure in Texas for evaluating the proper balance as set forth in *Carrillo, supra*, is to allow a defendant to explore the possibility of an agreement or unac-

ceptable bias in a bill of exceptions. If the bill shows some evidence of a *quid pro quo* for the witness's testimony, such evidence may be elicited before the jury. If not, then the evidence of collateral matters is not sufficiently probative to overcome the dangers of undue prejudice and jury speculation.

In this case, the trial court specifically found that there was no evidence of an agreement between the prosecution and Michael Moore. Although the record shows that he was discharged from proobation after he had served a little more than one-third of his probation, the officer who introduced the records testified that he knew of no agreement and that it was not unusual for a probationer to be discharged early if he had abided by the terms of his sentence. As to the two unadjudicated charges, one had been dismissed a full year before Michael Moore's initial contact with the Dallas Police regarding Petitioner, and the other charge was dropped at the request of Dallas County prosecuting authorities on the force of an affidavit of non-prosecution by the complaining witness, which was signed on September 17, 1976, again before Moore's contact with the police. In light of all the available evidence, the Texas Court of Criminal Appeals held that the trial court had not abused its discretion.

The procedure developed by the Texas state courts to guard the rights of a defendant while also protecting the State's interest are of course not subject to federal review unless that procedure deprives the defendant of some constitutional right. It is submitted that the action of the trial court in this instance, as ratified by the Texas Court of Criminal Appeals, is fully consistent with the values embodied in the Sixth Amendment. This Court has recognized that the Sixth Amendment does not guarantee unlimited cross-examination. A trial judge must exercise discretion to limit cross-examination in collateral matters. *Glasser v.*

United States, 315 U.S. 60 (1942). It also may limit cross-examination to protect a witness from being harassed or humiliated, *Alford v. United States*, 282 U.S. 687 (1931), or to put a stop to unduly prejudicial or repetitious cross-examination. *Davis v. Alaska*, *supra*. The defendant's right under the Sixth Amendment is to effectively cross-examine the witnesses against him.

What is effective cross-examination must necessarily depend on the issues at stake. In the context of this and similar cases, the important issue is whether the jury has enough evidence before it to intelligently evaluate the witness's testimony. *See, e.g., Skinner v Cardwell*, 564 F.2d 1381, 1389 (9th Cir. 1977), and cases cited therein. Various federal courts have recognized that this determination may properly hinge on the judge's deicision as to the relevance of the evidence in issue. *United States v. Gambler*, 662 F.2d 834 (9th Cir. 1981); *Skinner, supra; Chipman v. Mercer*, 628 F.2d 528 (9th Cir. 1980). In the case at bar, although the jury was not allowed to hear about Michael Moore's previous unadjudicated offenses, the State did elicit testimony concerning his probation and early discharge. On cross-examination before the jury, Moore stated that the Dallas police officials had told him they would send letters to his probation officer in order to help him obtain early release from probation. He also admitted to working as an informant in the past. Thus, the jury had reliable testimony in the witness's own words, on the basis of which they could consider the possibility of an agreement with the prosecution authorities, or bias against the Petitioner. The Petitioner was allowed to cross-examine Moore as to these matters; therefore, the trial judge's action in excluding other testimony which could only have led to speculation and confusion of the issues does not constitute a deprivation of Petitioner's Sixth Amendment rights.

Even if this Court agrees with Petitioner's conclusion that *Davis v. Alaska*, was not properly applied to his case, such a complaint is not a subject worthy of Supreme Court review. Petitioner has made no showing of a widespread practice in Texas of misapplying this Court's pronouncements on the proper scope of a trial court's discretion with regard to *Davis v. Alaska*. It is well-established that the Court sits to decide important, novel, or recurring questions, not to correct alleged errors or injustices in particular cases. This case represents nothing more than a trial court exercising its sound discretion as to a matter which this Court has recognized to be a proper subject of judicial control. The Sixth Amendment should not become a vehicle for state defendants to obtain federal review of every such decision by a trial judge. Since there is no constitutional issue at stake here, certiorari should be denied. *See, Davis v. Alaska, supra* at 321 (Rehnquist, J. dissenting).

B. Whether The Court Below Properly Applied a "Harmless Error" Rationale to any Sixth Amendment Violation at Petitioner's Trial is Not Presented Under the Circumstances of This Case.

Petitioner seeks review of his conviction partly on the basis on the conflict among the Circuits as to whether a trial court's erroneous limitation of cross-examination can ever be harmless error. Whether or not it would be sufficient to invoke this Court's certiorari jurisdiction, the question is not presented in this case. First, as discussed above, no constitutional error is shown. Beyond that, however, it is far from clear that the Texas Court of Criminal Appeals affirmed Petitioner's conviction on the basis of a "harmless error" doctrine.

Petitioner relies for his argument on language on page 8 of the state court's opinion, setting up the evidence

elicited by the defense in its bill of exceptions and on cross-examination before the jury (Petitioner for Certiorari, 6). In the context of the entire paragraph, however, it is clear that the quoted language related instead to the substantive question whether the trial court abused its discretion in excluding the evidence of extraneous matters.[1] The court, after expounding the doctrine announced in *Carrillo v. State, supra*, applied the facts of Petitioner's case to that procedure. It reviewed the relevant testimony, noted that Petitioner had been allowed to fully explore the possibility of an agreement between Moore and the State in the bill, and that the jury was apprised of the fact that Moore had been on felony probation during the time he was cooperating with the police. The court concluded that the Petitioner had failed to adduce any evidence, either in the bill of exceptions or on cross-examination, suggesting an agreement, bias, or improper motive and that the trial court's ruling was therefore consistent with *Carrillo v. State, supra*, and not an abuse of its discretion. At most, the quoted language is ambiguous as to whether the Texas courts would apply the harmless error rule to a certain type of trial error. This Court's exercise of its certiorari jurisdiction, however, should be reserved for a case where the question is squarely presented. The petition should be denied.

C. Petitioner Has Not Established A Clear Conflict Among the Circuits Regarding the "Harmless Error" Rule.

Petitioner asserts that the courts of appeals are hopelessly divided on the question whether a defendant must demonstrate that a Sixth Amendment violation is

1. Petitioner also claims that by not submitting such evidence to the jury, the trial court pretermitted the jury's function as fact-finder. Since the judge found *no evidence* of an agreement, however, the issue was not one of the credibility of witnesses.

prejudicial in order to obtain a reversal of his conviction. A review of the cited cases, however, reveals that no such conflict exists. *See,* Petition for Certiorari, 6-8. Many of the cases either address the problem in dicta, *Skinner v. Cardwell,* 564 F.2d 1381 (9th Cir. 1977), or were decided prior to *Davis v. Alaska, supra. United States v. Morris,* 485 F.2d 1385 (5th Cir. 1973); *United States v. Jorgensen,* 451 F.2d 516 (10th Cir. 1971), *cert. denied,* 443 U.S. 319 (1972).[2]

The circuits which have considered the question overwhelmingly have applied the harmless error rule to erroneous limitation of cross-examination. *See,* cases cited in Petition for Certiorari, 8; *United States v. Gambler,* 662 F.2d 834 (D.C. Cir. 1981); *Victory v. Bombard,* 570 F.2d 66 (2d Cir. 1978); *United States v. Polk,* 550 F.2d 1265 (10th Cir.), *cert. denied,* 434 U.S. 838 (1977); *United States v. Fife,* 573 F.2d 377 (6th Cir. 1976). Many have applied an automatic reversal rule only when cross-examination was completely foreclosed. *Greene v. Wainwright,* 634 F.2d 272 (5th Cir. 1981); *Chipman v. Mercer, supra.* Petitioner points out no more than a conflict within the Ninth Circuit, *United States v. Williams,* 668 F.2d 1064, 1070 n.14 (9th Cir. 1981); *Gambler, supra,* at 840, n.6, which is insufficient to justify this Court's review. Any conflict among the Courts of Appeals on this issue will be ripe for Supreme Court review only when the issue is resolved within the Circuits.

Moreover, it is submitted that the application of the harmless error rule is not improper in cases similar to this one. This Court has recognized that the existence of constitutional error does not rule out the possibility

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2. Petitioner's view of the law rests on language in *Davis v. Alaska* to the effect that denial of effective cross-examination "'would be constitutional error of the first magnitude and no amount of showing of want or prejudice would cure it.'" at 318.

of harmless error. *Milton v. Wainwright*, 407 U.S. 371 (1972); *Schnebel v. Florida*, 405 U.S. 427 (1972). Even prior to *Davis v. Alaska*, *supra*, the Court explicitly applied a harmless error standard to Sixth Amendment violations. *Harrington v. California*, 395 U.S. 250 (1969). It would be an unjustifiable waste of judicial resources automatically to reverse a conviction on the basis of a minor lapse, if it was not prejudicial. The language of *Holloway v. Arkansas*, 435 U.S. 475 (1978) is particularly instructive.

> In normal cases where the harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow tasks of assessing the likelihood that the error materially affected the deliberations of the jury.

Holloway v. Arkansas, *supra*, at 490. Petitioner's is just such a case. He was accorded the opportunity to fully develop a bill of exceptions setting out all the impeachment evidence he wished to present to the jury. The Texas Court of Criminal Appeals had a full record on which to evaluate the prejudicial impact, had they found the trial court erred. Thus, in the absence of a true conflict among the Circuits, or a substantial question for review, certiorari on this issue should be denied.

II. PETITIONER'S SECOND GROUND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Petitioner seeks a writ of certiorari on the additional ground that the court below misconstrued his sixth ground of error—the trial court's refusal to allow individual questioning of jury veniremen. Instead, according to Petitioner, the Texas Court of Criminal Appeals addressed a different question—whether Peti-

tioner was entitled to individual voir dire away from the rest of the panel. The alleged misapprehension of his argument is said to amount to a denial of due process of law or effective assistance of counsel, under the Sixth and Fourteenth Amendments.

Although couched in terms of constitutional rights, this issue raised nothing more than a question of state procedure. As Petitioner acknowledges, Texas law does not require an appeals court to write on every issue. *Hawkins v. State*, 613 S.W.2d 720, 723, n.8 (Tex.Crim.App. 1981). Petitioner claims that the court below failed even to consider his voir dire argument, based on his reading of the opinion. The court's statement of the issue was whether Petitioner "should have been allowed to question the members of the voir dire individually regarding their ethnic prejudices". Petition for Certiorari, Appendix A, 23. Limitation of voir dire in non-capital cases had occasioned reversal in Texas only where the defense was not permitted to ask certain questions, according to the court; since there was no such limitation in the present case, the trial court had not abused its discretion. Petition for Certiorari, Appendix A, 25. Thus, the language of the opinion is equally supportive of the view that the court below did consider Petitioner's argument. Further, since the issue was briefed at length by both parties and re-urged in Defendant's Motion for Rehearing, it is unlikely that it was completely ignored by the court.

At any rate, the state court's failure to consider the particular argument does not amount to a denial of due process.[3] Appeal from a state court conviction is not a matter of right. *Abney v. United States*, 645 U.S. 681

3. Petitioner's ineffective assistance argument is inapposite. Such a claim must rest on allegations of some action, or inaction, of the attorney, which are not present here. *E.g., Rinehart v. Brewer*, 561 F.2d 126 (8th Cir. 1977).

(1977). Thus, an irregularity in state appellate procedure raises a constitutional issue only if it results from *invidious* discrimination. *E.g., Anders v. California,* 386 U.S. 738 (1967). Here, although Petitioner cites cases articulating the standard, he fails even to allege invidious discrimination by the Texas Court of Criminal Appeals.

Since Petitioner's claim does not raise a substantial federal question, this Court should decline to review the purely speculative claim.

For the foregoing reasons, Respondent respectfully prays that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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